

# Journal of Legislation

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Volume 14 | Issue 2

Article 4

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5-1-1987

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### Recommended Citation

Morrison, Alan B. (1987) "One Member's Reflections on the American Bar Association Tort Commission; Symposium on Product Liability," *Journal of Legislation*: Vol. 14: Iss. 2, Article 4.

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# ONE MEMBER'S REFLECTIONS ON THE AMERICAN BAR ASSOCIATION TORT COMMISSION

*Alan B. Morrison\**

If you're pestered by critics and hounded by faction  
To take some precipitate, positive action,  
The proper procedure, to take my advice, is  
Appoint a commission and stave off the crisis.<sup>1</sup>

## INTRODUCTION

In the fall of 1985, I received a telephone call from Professor Robert McKay of New York University Law School, whom I have known for about 10 years. He said the American Bar Association had formed a Commission<sup>2</sup> to make recommendations for specific action on what some were calling the "insurance crisis" or the need for "tort reform," and he asked me to become a member. Although Public Citizen, for which I work, had taken some positions on the issues, as had the organization's former president, Ralph Nader, I confessed that I had relatively little experience in torts. I asked whether he wanted my views or my organization's, and I expressed concern about the time commitment.

His replies were disarmingly direct. He recognized that I did not have an extensive background in the area, and that was one of the reasons he wanted me and a number of others on the Commission—to provide objective viewpoints on difficult problems. Second, he said we would meet half a dozen or so times for two days each during the next year, and our report had to be concluded by November 1986. Finally, he assured me that he wanted my views and no one else's.

After giving the matter some thought, talking to others in Public Citizen about my role and receiving assurances that my independence would not cause insoluble problems, I agreed to join the Commission. Although I endeavored to keep my colleagues informed, I did not always agree with their positions, which led to at least one story memorializing our differences.<sup>3</sup> Although I never discussed this matter directly with most of the other Commission members, I feel confident that at least some of the others felt similar pressures from their constituents to go along with, or oppose, certain provisions being considered.

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1. G. Parsons, *Royal Commission*, PUNCH, Aug. 24, 1955.

2. AM. BAR ASS'N, REPORT OF THE ABA ACTION COMM'N TO IMPROVE THE TORT LIABILITY SYSTEM, at i (1987) [hereinafter cited as REPORT].

3. *Morrison Rankles Old Allies By Supporting Tort Package*, Legal Times, Feb. 23, 1987, at 3.

The description that follows is nothing more than one member's version. It is necessarily selective because of time and space limitations, and it inevitably will emphasize events that were more important to the author than to others. There undoubtedly will be differences among Commission members about the accuracy of some of the details, but, I hope, not on the general themes and broad propositions. If others do dispute the details, their memories and notes are entitled to at least as much credence as this account. Rather than trying to provide a complete history of what occurred, I have attempted to convey the flavor of how the problems were approached and the issues resolved.

The Commission's fifteen members were all lawyers. The group included members of the plaintiffs' and defense bars, representatives of the insurance industry, three judges (two federal and one state), and representatives of consumer and public interest organizations. The Commission was perhaps as balanced as any group of its size could be, given the inevitable differences of opinion on the issues.

In the account that follows, I have avoided identifying any members, although those on the inside undoubtedly will be able to discern the source of various positions. I chose to assign neither credit nor blame, because most of the ideas were not the product of any individual, but came out of group discussion in which no one could be identified as the originator, or from a discussion in which the idea was put on the table and changed so markedly that it would be inaccurate to ascribe it to the person who first spoke it.<sup>4</sup>

### THE DIRECTIVE

In the beginning, we all recognized there were serious limits on our work. The first was the time the members could devote. A pundit once remarked that in order to be selected for a commission such as this, one must prove himself too busy to serve. Whatever the truth of that saying, most members of the Commission were able to devote a substantial amount of time, but by no means more than a fraction of their working lives during the year.

Second, we had a very tight deadline dictated in large part by the desire of the ABA to have our report presented for action by the House of Delegates at the February 1987 meeting. This meant we had to complete our work by early December 1986 in order to have time for the report to be circulated and considered by the relevant sections and committees of the ABA.

Third, the backgrounds of the Commission members, although varied, simply could not deal with all of the areas within our broad mandate. Many of the members had tort experience—as litigators, academics, judges and even clients—and others had other valuable backgrounds. But only representatives of the insurance industry were familiar with the relevant insurance issues.

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4. Not identifying members may lessen the problem of violating confidences, which I trust I have not done anyway, even though there was not much confidential discussion.

Finally, we were directed to be an action Commission, to produce recommendations on which the ABA could vote and which could be translated into improvements in the tort system in the immediate future. Although the definitions of "action" and "improvements" are subject to interpretation, there were significant limits on what we could do, or were expected to do from the ABA's perspective.

In the end, a large part of what we were able to do was because of the superb work of our reporter, Professor Robert Rabin of Stanford Law School. Neither the reporter nor the Commission members could undertake massive research<sup>5</sup> or read hundreds of new articles or conduct detailed reviews and analyses of prior studies. In short, we had to base our work on our experience and data, supplemented by the ability of some members and the reporter to look into a few areas in greater detail.

Second, as an action Commission, we were hoping to make recommendations that the ABA could adopt. It was remarked several times that the ABA would never accept a particular position, but that never kept us from making a recommendation where we thought it was the right course of action. On the other hand, although we had discussions on innovative schemes for compensating victims of personal injuries, there appeared to be a consensus that there was little interest in proposing an alternative scheme that would replace, rather than improve, our tort system.

Third, the topic of availability and affordability of liability insurance came up throughout the proceedings. New York state recently had completed a massive two-part study in which it said that both tort law and insurance law needed revision. No one doubted the importance of reviewing the problem of insurance, but most of us felt tort law needed some adjustments and changes, regardless of whether the insurance crisis could be solved. Furthermore, we recognized that the so-called insurance crisis was the "but for" cause of the creation of the Commission: it would not have been created without all of the complaints about insurance.

On the other hand, we were constrained in our ability to deal with insurance aspects of the problem because of time limitations and the lack of expertise among the Commission members. Thus, fairly early on, it was generally agreed that we would not make significant recommendations in the insurance area.<sup>6</sup> Although I am certain it did not satisfy everyone, the Commission decided to highlight the importance of the insurance issue by making our first recommendation that the ABA create a commission to do for insurance what we had done for torts.<sup>7</sup>

Fourth, we recognized we could not deal with everything that might fall within the definition of tort law. Thus, we limited ourselves to physical

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5. Although the Commission had administrative assistance from Carolyn Taylor of the ABA Tort and Insurance Practice Section in Chicago, we had no legion of lawyers to draft reports and do independent research, and we had neither the time nor the money to procure outside assistance.

6. At least that was my perception. Apparently, my views were not shared by all Commission members, because at the end we almost came apart as a result of the lack of specific recommendations made for the insurance part of the problem.

7. The Commission's approach also was used to deal with the problems of mass torts, which we simply did not have the time, and possibly the expertise, to resolve.

injuries and omitted the topic of libel law, as well as bad-faith refusal to pay insurance claims and bad-faith discharge of employees, both of which generally are considered to be torts. Again, this was largely a question of time. Related to this, however, was our desire to avoid what had occurred when the ABA rejected prior recommendations on medical malpractice changes because the issue was separated from the broader context of overall tort reform. Therefore, part of this decision may have been our desire to not single out certain areas for special treatment. Our failure to do so should not be seen as an indication that we rejected any separate treatment of separate areas, except where our report explicitly states that we had considered them and had done so.

### THE CONCEPT

From the outset, it was apparent to me and to most of the others that any report we produced would not fully satisfy any Commission member or probably any observer. There were directly opposing views on most issues that the Commission considered. Commission members often were able to agree on goals, but they differed sharply on the means of achieving them.

Commission members quite soon recognized that if a consensus were to be reached, recommendations on individual topics should not be included unless there was substantial support for them. In the end, there was something each of us disliked in the package, and the question became, was there anything that we really liked in it? It was not enough that it was simply less bad than the alternatives; it had to include some affirmative benefits to society, or at least the segments each of us considered most important. Implicit in this approach was the recognition that the impetus for the Commission had come from the defense bar, because no one had been talking about giving victims more money or increased rights. Nonetheless, I think it fair to say that most people agreed that some reforms to help at least some victims had to be included in order to make the package creditable and palatable.

After some early general discussions, the Commission asked the reporter to put together our concepts and present them in both a discussion format and as recommendations to be distributed in advance of Commission meetings and debated at length during them. Fortunately, the reporter captured the sense of debates and developed a series of drafts of such high quality that we could focus on substance rather than rewriting. Under this process, we voted on individual items as they arose, with the understanding that each of us was reserving judgment on the package until the end, when we would decide whether we could go along with the whole set of recommendations.

One other insight into the issues became apparent to me and changed my evaluations of some of the proposals. When I began, I thought that the issues were divided between plaintiffs and defendants. But, as we progressed, I recognized that there was a third distinct interest in the matter that sometimes, but not always, overlapped: the interest of members

of the bar in these issues. To some extent, the observation applied to attorneys on the plaintiff and the defense side. All of them are a part of the problem of high fees, inordinate delays, and business as usual instead of innovation. Most of the public criticism and suggestions, however, were directed toward plaintiffs' attorneys rather than defense counsel. Seen in this light, some of the changes will help victims, but will do so at the expense of their attorneys, rather than the defendants.

Interestingly, the suggestion that had received the most prominence in the press received no support from the Commission: a cap on plaintiff's attorneys fees. It was rejected without a formal vote, largely because it was considered not helpful to defendants, potentially harmful to victims if their attorney lost the financial incentive to fight on, arbitrary if percentage limitations were used, and difficult if not impossible to manage were any more complicated formulas used. Nonetheless, we recognized that something had to be done about attorneys fees, so we provided some alternatives described below.<sup>8</sup>

### SELECTED ISSUES

No useful purpose would be served by tracing the history of our debates on all the issues. Indeed, a full history of any one of the issues probably would be far more burdensome than beneficial. Nonetheless, some selected discussion about how we proceeded and reached our consensus may be of some help to those who want a fuller understanding of what we did and why, or it may help those who serve on future commissions and want some guidance on what to do and not to do on them.<sup>9</sup>

#### Attorneys Fees

The Commission rejected any attempt to put a cap on fees, and no one spoke in favor of a requirement that they be justified as reasonable to the court or some other body in every case.<sup>10</sup> One area we agreed upon quite early was the need for providing greater information to clients, principally plaintiffs, before they hire counsel in personal injury cases.<sup>11</sup> Accordingly, we recommended that a disclosure statement, which would be approved by the state's highest court, be made available to prospective plaintiffs by the attorney before a fee agreement is entered.<sup>12</sup> The text of the disclosure statement was originally included in the recommendation but was moved to the comments, which indicates that the draft statement is simply illustrative of the kind of information that we think should be

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8. See REPORT, *supra* note 2, at iii, 25.

9. Because this commentary focuses on what the Commission did, it does not include what happened after our final report was issued, including negotiations with other sections and the changes that were made on the floor of the ABA's House of Delegates. Those changes are important, but they are a different story, in which this member was involved only to a small degree.

10. See *supra* note 9 and accompanying text.

11. See REPORT, *supra* note 2, at 27, Comment (a).

12. See *id.* at 27, Recommendation No. 7.

available, i.e., information about fee options so the client will think about them before a retainer agreement is signed, rather than after.<sup>13</sup>

A second area of concern about attorneys fees was the practice of some lawyers of taking a percentage of their fee out of the gross award, rather than out of the net award.<sup>14</sup> Because most clients do not read fee agreements, and surely do not appreciate the difference between net and gross at the time they sign them, disclosure is unlikely to be useful. In our view, use of a percentage of the gross recovery casts the profession in a bad light, especially when a case was tried or settled and the attorney ended up with more than the client. Despite pleas that the practice was common, we recommended that percentages be taken only out of the net award and that a mandatory rule be adopted.<sup>15</sup>

Perhaps our most controversial recommendation in the fee area is to have post-judgment review of the reasonableness of fees.<sup>16</sup> Unlike earlier recommendations, this will apply to counsel for plaintiffs and defendants. In some ways, the recommendation is unnecessary because courts always have recognized their power to review attorneys fees for reasonableness. But the power is virtually unused, mainly because in most cases there will be contracts for fees, and the courts are reluctant to go behind them, whether they are for contingent fees or on another basis. Moreover, even if in theory they could be attacked, most clients are unwilling to do so after the case has been concluded, particularly when the plaintiff has received a recovery and has signed a statement agreeing to the payment of an attorney's fee. Even for a defendant for whom all the payments may not have been made, there is simply no desire in most cases to reopen a controversy and fight about legal fees.

The Commission recognized that to be effective, the proposal would have to involve an opportunity for courts to raise the issue on their own. To do that, courts would have to receive information from both sets of counsel to preliminarily assess whether the fees for either side were too high. If they were, further proceedings would be required.

One obvious weakness of our proposal is that it does not encompass settlements as well as judgments. This was recognized as a serious problem because in many situations, a settled case will produce the most unreasonable fees, particularly on a contingent basis, when the settlement occurs early in the process. Nonetheless, we agreed that this idea should be presented as a first step in the direction of controlling fees, for without it there was no chance that fees would come under greater scrutiny, and they would continue to spiral upward. Although I supported the recommendation as an innovative way of dealing with the problem, I do not expect that it will be swiftly enacted into the rules of practice of any jurisdiction, because it goes so much against the grain of the way lawyers have always handled their fee matters with clients. But at least the idea

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13. See *supra* note 12 and accompanying text.

14. See *id.* at 29, Comment to Recommendation No. 8.

15. See *id.* at 29, Recommendation No. 8.

16. See *id.* at 29, Recommendation No. 9.

pointed to a problem and challenged others to find an alternative solution to it.

### **Pain and Suffering**

Perhaps the most volatile issue the Commission faced was a cap on pain and suffering damages.<sup>17</sup> A number of states already had enacted caps, some limited to medical malpractice and some more general, and the Justice Department had proposed a \$100,000 ceiling on all pain and suffering recoveries.

Based on our review of existing data, which was by no means complete, we concluded that median awards had not increased significantly compared with the cost of living. Average awards had gone up a good deal more,<sup>18</sup> largely as a result of the increase in awards at the high end of the spectrum. We also were concerned about anecdotal evidence that had appeared in the press, much of which turned out to be inaccurate, but which, nonetheless, affected public perceptions. Both the increase in the number of high verdicts (some of which were drastically reduced on appeal) and the often inaccurate anecdotes were considered by many to have been a factor in higher settlement costs.

Despite the widespread concern about high awards and the pressure to impose a ceiling,<sup>19</sup> no one seriously advocated that the Commission recommend a cap on pain and suffering awards. Everyone seemed to recognize the arbitrariness of caps and the unfairness of penalizing the most seriously injured. Indeed, there was some concern on the defense side that caps could become floors as well as ceilings, especially if juries were told about them. Nonetheless, we could not refuse to address the issue. Hence, we took two steps, one directed at pain and suffering awards,<sup>20</sup> and one directed at the related issue of joint and several liability,<sup>21</sup> which becomes most acute where there are large pain and suffering awards.

One problem the Commission recognized with pain and suffering was that juries get no guidance on it, in contrast to the relatively specific instructions given for other aspects of liability and damages. In our discussions, we seriously considered recommending that guidelines be established and that judges instruct juries concerning the reasonable range of pain and suffering in each case.<sup>22</sup> Such instructions would not be binding, and juries would be told specifically that they could go above or below them.<sup>23</sup> The obvious message, however, would be that juries ought not do so, except in unusual cases.

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17. *See id.* at 10.

18. *Id.* at 11.

19. *Id.*

20. *Id.*

21. *See id.* at 20-25.

22. *See id.* at 15, Recommendation No. 4.

23. *Id.*



A related proposal would have collected data on awards for pain and suffering in cases that went to verdict, but not for settled cases.<sup>24</sup> The idea was to develop reasonably detailed information and, eventually, guidelines similar to those that have been used to improve the consistency of criminal law sentences.

There were obvious complications in developing these proposals, including whether the entity that would prepare the guidelines would be local, state or national, how to compare different kinds of injuries, and how settlements could be taken into account. Nonetheless, we thought that they were solvable with experience and thought. We also were hopeful that the existence of guidelines would help settle cases, as well as control verdicts. But many on the Commission were concerned that allowing judges to suggest ranges for pain and suffering gave them too much power.

In the end, we included this proposal only as a possibility in the discussion portion, but at least we produced an idea that, so far as we were aware, had not previously surfaced and now can be considered in other forums. What we did recommend, which may have some effect but is not likely to have an enormous impact, is to urge that courts exercise more control over generous and inadequate verdicts through greater use of additurs and remittiturs.<sup>25</sup> We recognized that, in all probability, most of the control would be toward reducing rather than increasing verdicts, assuming that the latter is possible in the particular jurisdiction in the light of the right to trial by jury. Although we recognized that there was at least a perception problem, because this recommendation goes in basically one direction, we were not able to devise another solution that would be acceptable and workable in the real world.

### **Joint and Several Liability**

On the issue of joint and several liability, which we considered both as a separate issue and as part of the pain and suffering controversy, there were two competing considerations. The problem as it was presented to us was that in some cases, a defendant who was minimally liable could end up paying 100% of a massive judgment when the other tortfeasor turned out to be uninsured, underinsured or unlocatable. On the one hand, it was argued that it was unfair to make such a defendant fully liable for a huge award, and the other side argued that the denial of compensation to the innocent victim was at least as unfair, if not more so.<sup>26</sup>

In the end, we drew some lines that were arbitrary but represented a compromise between these two difficult alternatives. First, we decided that non-economic damages, i.e., pain and suffering, should be treated differently than lost wages, medical expenses, etc. We recommended that

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24. *See id.* at 14, Recommendation No. 3.

25. *See id.* at 13, Recommendation No. 2.

26. *See id.* at 22.

joint and several liability be retained for the latter, no matter how disproportionate responsibility was among the defendants, in order to ensure that those damages are fully paid for the plaintiff.<sup>27</sup> On the rest of the damages, we recommended that joint and several liability be abolished, but only where there were substantially disproportionate shares of the liability among the defendants, in which case the lesser liable defendant would pay only its share.<sup>28</sup> We recommended twenty-five percent as our cutoff, not because that is a magic number, but to indicate that we did not want the rule to be kicked in at either five percent or forty-five percent.

In a way, this recommendation was typical of what the Commission tried to do: to find a compromise position that may have had intellectual weaknesses from a doctrinal perspective, but was politically palatable and might alleviate if not eliminate the worst aspects of the problem.<sup>29</sup>

### Collateral Source Rule

Another damage-related issue the Commission faced, and on which we came out differently from where we started, was the collateral source rule.<sup>30</sup> Under it, a plaintiff is entitled to recover for an item such as medical expenses, even if those expenses are paid by someone else, typically an insurance carrier. Despite the double payment, the rule has been justified on the ground that the opposite rule would result in a windfall to the defendant.<sup>31</sup> In addition, before the days of extensive insurance coverage and other reimbursement plans, the typical plaintiff would not have much in the way of collateral sources. Today, the critics of the rule argue, there is substantial potential for double recovery,<sup>32</sup> and that is unfair.

Commission members found that the more we looked at the collateral source rule, the more complicated the problem became. For instance, although eliminating double recovery sounds imminently fair in theory, it makes a good deal less sense when the double recovery is as a result of protection for which the victim has paid.<sup>33</sup> Thus, a plaintiff who has paid for automobile insurance and whose car is destroyed as a result of the defendant's negligence is not receiving a windfall; indeed, to allow the defendant to escape liability in that situation would give the defendant a windfall.<sup>34</sup> Similarly, beyond the coverage for which the plaintiff has paid,

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27. *See id.* at 23, Recommendation No. 6.

28. *Id.*

29. To some members of the Commission, the problem of joint and several liability was in significant part due to the under insurance or lack of insurance of many automobile owners. To them, the insurance problem could be and should be dealt with separately, and if done so, could largely, although not entirely, eliminate this joint and several liability issue.

30. *See id.* at 22 (note); *see generally id.*, App. B.

31. *See id.* App. B at B-2.

32. *Id.* App. B at B-1.

33. *See supra* note 32 and accompanying text.

34. Of course, that is an over simplification because a plaintiff rarely will have paid in premiums 100% of his or her recovery. But the problem of calculating which portion should be attributed to the plaintiff and which to everyone else underscores the difficulty in arriving at a perfect solution.

medical insurance often is paid at least in part by an employer.<sup>35</sup>

Furthermore, the issue is complicated by the law of subrogation. The Commission heard conflicting versions of how effective subrogation is, although most people seem to agree that for small amounts, subrogation is not cost-effective for most insurance carriers. Some Commission members defended the present rule on the ground that it does not provide a windfall for the plaintiff, but simply insures that the victim receives a full recovery, after payment of attorneys fees and other expenses.<sup>36</sup>

For a considerable time, the Commission had a draft recommendation that, as a form of rough justice, provided that payments from collateral sources up to \$25,000 would be disregarded, but the defendant would be able to reduce the judgment by any amount over that. Commission members recognized this was a political compromise, but one designed to prevent the worst abuses, without undercutting the other important interests at stake. Ultimately, the proposal was rejected because it did not do much, and it created another level of complexity. Other alternatives were rejected, also on the grounds that they were not fair and practicable. In addition, most Commission members thought that the worst cases of windfall could and should be dealt with by subrogation: If the insurance companies did not care, then it was not a problem of unjust payment for the plaintiff, but simply the failure of an insurance company to collect the amounts to which it was rightfully subrogated. As a result, we made no recommendations in this area.

Our discussions of the collateral source rule reflected a theme that appeared often, if not on every issue. There was a perceived problem and often a real one, but the solutions offered were no better than the existing situations. Indeed, fairness and justice often do not sit neatly with simplicity, and the cost of evening out inequities is, too often, far greater than the harm from leaving small ones in place.

### **Punitive Damages**

On the issue of punitive damages, we also did not maintain a steady course, although we did come out with a recommendation in the end. As with our discussions on pain and suffering, we rejected a cap on punitive damages<sup>37</sup> but recommended that courts exercise greater control in reducing the amounts when they were inappropriate.<sup>38</sup> We also recognized the unfairness of multiple punitive damages if each jury awarded them on the assumption that no one before or after would do likewise. We viewed this issue as having to do with the problem of mass torts. Although we made a general recommendation on the unfairness aspect, we left it to the proposed mass tort commission to develop a procedure to insure that

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35. That, too, is an overstatement, because the worker generally receives medical insurance as part of an overall compensation package.

36. See *supra* note 33 and accompanying text.

37. See REPORT, *supra* note 2, at 18.

38. See *id.* at 19, Recommendation No. 5(e); see also *id.* at 20, Comment (e).

punitive damages are adequate, but not excessive.<sup>39</sup> We also recommended some procedural changes to insure fairness, but the principal effect will be on plaintiffs with punitive damages claims, who will lose leverage over the defendants, at least at the settlement stage.<sup>40</sup>

Our most difficult decision regarding punitive damages related to the standard under which they should be awarded. The issue revolved around the inclusion or exclusion of recklessness, with the paradigm case of whether a drunk driver should be liable for punitive damages. On its original vote, the Commission included recklessness within the category of offenses for which punitive damages would be awardable, but it revised that to insist upon a higher standard.<sup>41</sup> Whether the jurors understand the difference between these standards is not at all clear. A Commission member who specializes in tort litigation pointed out that regardless of the standard, punitive damages are only awarded when the jury is outraged by the defendant's conduct. Therefore, the precise legal standard is often far less important in reality. The Commission also reviewed the available data and concluded that most punitive damage awards are for intentional torts or for bad-faith refusal to pay insurance claims. Thus, whatever the standard, it was unlikely to significantly increase or decrease the number of such awards.

### Other Issues

Of course, there were a number of other significant issues, each with its own history and rationale. Although some of those issues might be worth including because of their substance, they would be unlikely to lead to an increased understanding of how the Commission as a whole worked and how it viewed its task. Examining them would, however, further establish that the members of the Commission operated with open minds throughout, considered minor tinkering and far-reaching changes, recommended nothing that they thought would not make a difference, but urged changes even if they thought ultimate enactment by the appropriate body was remote. Although the results may not be pleasing to everyone, or perhaps to anyone, there can be little doubt, at least from this member's perspective, that the process was fair and open and that there was an opportunity for anyone with an idea to present it, have it debated and have it voted up or down.

### THE DISSENTS

Because of the spirit of cooperation and mutual respect among the Commission members, and because of the consensus-building skill of the Chairman, I thought that any dissents would not create serious problems. As the package evolved, I saw the pluses and minuses and concluded that the recommendations as a whole presented a fair compromise. Some of

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39. See *id.* at 19, Recommendation No. 5(d); see also *id.* at 20, Comment (d).

40. See *id.* at 19, Recommendation No. 5(c); see also *id.* at 20, Comment (c).

41. See *id.* at 18, Recommendation No. 5(a); see also *id.* at 19, Comment (a).

its elements would not have been part of my or others' proposal for a legislative solution, but because that was not the test I thought should be applied in casting my vote, I supported the final package.

With one exception, no member expressed an intent to dissent until the last meeting, and in some cases not until after that. Perhaps it was because of the spirit of cooperation and respect, but it seemed to me that fundamental differences had been put aside and were not faced until the end. When we finally were required to say aye or nay, four members dissented<sup>42</sup> on the grounds that the report tilted too much toward the defense side. Had there been time for another meeting, we might have changed some of those votes, either by persuasion or by changes in some recommendations. But we did not. My principal concern about the dissents was that they would make it less likely that the report would be adopted. Although the report was changed before the House of Delegates approved it, none of the changes go to the heart of our recommendations, so the issue of the dissents is of little more than passing interest.

### CONCLUSION

Now that the ABA has approved the report, with a few modest changes, the Commission and the ABA are on record as proposing a balanced package that, although not perfect, is something with which everyone can live. Whether others will agree, and whether the legislatures, and to some extent the courts, will accept this as a package, or destroy the compromise by taking only parts of it, or do nothing at all, remains to be seen. The Commission did what it set out to do; now the rest is up to others.

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42. The four dissenters were Judge Jim R. Carrigan, Leonard Decof, Elaine Jones and Thomas Lambert.